

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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February 21, 1997

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 96-1-M  
Petitioner : A. C. No. 23-00009-05523  
v. :  
: Auxvasse Stone & Gravel  
AUXVASSE STONE & GRAVEL CO., :  
Respondent :  
:

SECRETARY OF LABOR, : CIVIL PENALTY PROCEEDING  
MINE SAFETY AND HEALTH :  
ADMINISTRATION (MSHA), : Docket No. CENT 96-101-M  
Petitioner : A. C. No. 23-00009-05525 A  
v. :  
: Auxvasse Stone & Gravel  
ROBERT E. KUDA, Employed by :  
AUXVASSE STONE & GRAVEL CO., :  
Respondent :

**DECISION**

Appearances: Margaret A. Miller, Esq., Office of the Solicitor,  
U. S. Department of Labor, Denver, Colorado, for  
Petitioner;  
Terry S. Kraus, President, Auxvasse Stone & Gravel  
Company, St. Louis, Missouri, for Respondents.

Before: Judge Maurer

These consolidated cases are before me upon the petitions for assessment of civil penalty filed by the Secretary of Labor (Secretary) against the Auxvasse Stone & Gravel Company, (Auxvasse) and Mr. Robert E. Kuda pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' ' 815 and 820. The petitions allege that Auxvasse violated the mandatory standard found at 30 C.F.R. ' 56.14100(c) and that Mr. Kuda, as an agent of the corporate operator, knowingly authorized, ordered or carried out that violation. The Secretary seeks civil penalties of \$500 against Auxvasse and \$500 from Mr. Kuda.

Pursuant to notice, these cases were heard at Clayton,

Missouri, on November 14, 1996.

On May 16, 1995, MSHA Inspector Robert Seelke issued section 104(d)(1) Citation No. 4329604 to Auxvasse alleging that:

The AOld Cat@ 769B, haul truck parked in the shop parking area and designated as ready for use was found to have problems with the steering. The bearing for the steering cylinder stem on the left side was missing. This created a condition of an approx 3/4" difference in the diameter of the stem eye and the holding pin. The cylinder stem eye was resting around the pin but was not securely attached to the pin. The tie rod on the right front wheel was in a similar condition with the exception that there was a portion of the broken bearing still within the rod, however, it would not hold the tie rod end securely in place. These conditions create a hazard of either the left steering cylinder or the right tie rod becoming disengaged from anchor points and causing a serious steering defect when the truck is used. It is used on various grades and various speeds to haul rock in conjunction with other mobile equipment. According to production records the truck was last operated on 5-10-95. Further investigation showed that the truck was operated on a fairly regular basis during July 94. After discussion with several employees it was determined that this condition had existed both during July 94 & May 95. It was also determined that the condition had been reported to management on several occasions during this time period. After discussion with the foreman it was determined that he was aware of this situation and had told the owner of the company. The foreman also stated that he personally did not feel that this was a serious mechanical problem. This is an unwarrantable failure.

The standard cited, 30 C.F.R. ' 56.14100(c), provides as follows:

(c) When defects make continued operation hazardous to persons, the defective items including self-propelled mobile equipment shall be taken out of service and placed in a designated area posted for that purpose, or a tag or other effective method of marking the defective items shall be used to prohibit further use until the defects are corrected.

**Findings, Conclusions and Discussion**

The mine involved in this case is an open pit limestone mine, employing 12 persons, located near Auxvasse, Missouri. On May 16, 1995, Mr. Robert E. Kuda was in charge of the operations there, as Mr. Kraus, the company president, was out of town.

Inspector Seelke testified that during a regular inspection of the mine on May 16, 1995, he inspected a Caterpillar 769B, a large haul truck. He found that the left steering cylinder stem did not have a swivel bearing in place. It was completely gone, and the steering stem was laying over the pin on the arm assembly. The problem was that there was nothing to hold the steering cylinder stem on the pin on the arm assembly. Basically, just gravity was holding the steering cylinder in place. On a typical mine haul road it could bounce off, and at that point, you could lose some steering capability. Inspector Seelke considered this to be a hazardous defect to anyone who might drive this equipment.

On the right side of the truck, the steering cylinder was in good order. But the tie rod end that goes on the steering arm was defective. A portion of the bearing was broken apart, so that the tie rod was resting against the pin, instead of the bearing in-between. Once again, the inspector considered this to be a hazardous equipment defect that could affect the steering of the truck. If you hit a bump, the tie rod could come off.

At the time the inspector observed the truck in this condition, it was setting on the ready line. It was not in use at the time he observed it, but it was on the ready line to be used if another truck went out of service. He determined that the last day the truck was used was May 10, 1995. He also determined from Auxvasse employees that the truck was in the defective condition that he found it in when it was last operated on May 10, 1995.

The inspector opined that the effect of these steering defects would create a hazard. If the steering cylinder was to come off, you could no longer turn the truck. If the tie rod end came off, the truck would be very difficult to control, in his opinion.

Inspector Seelke also opined that it was very likely that either or both of these conditions could occur, given the conditions he found and the terrain around the mine site. The

effect of a loss of control of the truck could reasonably lead to a pedestrian in the area being run over, or the truck going through a berm and over an embankment, thereby seriously injuring the driver.

The two cited defective conditions were very obvious and the inspector determined from talking with the employees that the acting foreman, Robert E. Kuda, was aware that these conditions had existed for sometime, and that no appreciable effort had been made to correct them. The miners that the inspector talked to informed him that the truck was in this condition since at least July 1994, and that it had been reported to management at that time on several occasions and nothing was done about it.

The respondents do not dispute that the truck was in the condition that the inspector found it in and as it is written up in the citation at bar. However, they argue that as to the right tie rod end defect, Mr. Kuda, and therefore the company, had no knowledge of the degree or magnitude of the defect until it was uncovered by the inspector, the picture taken, and so forth.

Mr. Kuda testified at the hearing and stated that one of the truck drivers pointed out the left steering cylinder problem to him he thought in December 1994, but then the truck was in the shop for something else and was not used again until May 1995, and even then on a very limited basis.

Mr. Kuda also disagrees with the degree of danger presented by the defects in the steering mechanism. He maintains these problems would not lead to a total loss of control of the vehicle. He states that you would still be able to drive it because there is an additional steering cylinder and tie rod to keep the steering system intact and prevent total loss of control. Also, Mr. Kuda emphasizes that this is a spare truck. It is only used once in awhile if some other truck is out of service.

Mr. Kuda also denies knowledge of the defect in the right tie rod end. Nobody ever pointed that out to him, at least not to his recollection. Further, it is stipulated by the Secretary that the employees, truck drivers, never wrote the problem up on the equipment squawk sheet, as they were supposed to do by company policy. However, he was aware that there was a rag tied over the defective tie rod end for about a year, but he never took it off to look under it to see what the problem was.

I find that a violation of 30 C.F.R. ' 56.14100(c) occurred as charged. Actually, it is admitted by both respondents in the record of proceedings.

The Secretary further maintains that the violation was Asignificant and substantial.@ A violation is properly designated as Asignificant and substantial@ if, based on the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature. *Cement Division, National Gypsum Co.*, 3 FMSHRC 822, 825 (April 1981). In *Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (January 1984), the Commission explained:

In order to establish that a violation of a mandatory standard is significant and substantial under *National Gypsum* the Secretary must prove: (1) the underlying violation of a mandatory safety standard, (2) a discrete safety hazard C that is, a measure of danger to safety C contributed to by the violation, (3) a reasonable likelihood that the hazard contributed to will result in an injury, and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

See also *Austin Power Co. v. Secretary*, 861 F.2d 99, 103-04 (5<sup>th</sup> Cir. 1988), *aff-g* 9 FMSHRC 2015, 2021 (December 1987) (approving *Mathies* criteria).

The third element of the *Mathies* formula requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1834, 1836 (August 1984), and also that the likelihood of injury be evaluated in terms of continued normal mining operations. *U.S. Steel Mining Co., Inc.*, 6 FMSHRC 1573, 1574 (July 1984); See also *Halfway, Inc.*, 8 FMSHRC 8, 12 (January 1986) and *Southern Ohio Coal Co.*, 13 FMSHRC 912, 916-17 (June 1991).

Inspector Seelke testified convincingly that it would be reasonably likely that if this truck continued to be used in normal mining operations, there would be a serious deterioration in the ability of the driver to steer it, and therefore, there would be at least a partial loss of control of the vehicle. And this is a large vehicle. It is approximately a 30 to 35-ton haul truck with tires about 5 feet high off the ground.

I credit the inspector's belief that with the two acknowledged defects in the steering mechanism it was reasonable to expect that the left steering cylinder and the right tie rod would come off in the normal use of the vehicle over the mine's rough haulage roads. The resultant loss of control could be a hazardous situation for both the driver of the haul truck and most especially for any pedestrian workers in the area. Serious or fatal injuries would be a reasonably likely result of such an occurrence.

Within this frame of reference, it is clear that this violation was significant and substantial, and I so find.

The Secretary also maintains that the violation was the result of an unwarrantable failure. Unwarrantable failure is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997 (December 1987). Unwarrantable failure is characterized by such conduct as reckless disregard, intentional misconduct, indifference or a lack of reasonable care. *Id.* at 2003-04; *Rochester and Pittsburgh Coal Company*, 13 FMSHRC 189, 193-94 (February 1991). Relevant issues therefore include such factors as the extent of a violative condition, the length of time that it existed, whether an operator has been placed on notice that it existed, whether an operator has been placed on notice that greater efforts are necessary for compliance and the operator's efforts in abating the violative condition. *Mullins and Sons Coal Company*, 16 FMSHRC 192, 195 (February 1994).

The evidence is clear that Mr. Kuda, a management employee, was aware of the defect concerning the left steering cylinder for a long time (approximately 5-6 months) before it was cited by Inspector Seelke. He nevertheless did nothing to correct this unsafe condition but rather allowed the truck to remain in service, available for use. This evidence alone is sufficient to support a finding of high negligence and an unwarrantable failure.

Under all the facts and circumstances present in this case, I find that the violation herein was the result of high negligence and an unwarrantable failure and Citation No. 4329604 will be affirmed herein as it was written. Considering the penalty criteria found in section 110(i) of the Act, I further find that the proposed civil penalty of \$500 against the corporate operator is reasonable and appropriate, and will be assessed herein.

## The Section 110(c) Case

The Commission has defined the term **Knowingly** that appears in section 110(c) of the Act<sup>1</sup> in *Kenny Richardson*, 3 FMSHRC 8, 16 (January 1981), *aff'd* 689 F.2d 623 (6<sup>th</sup> Cir. 1982) as follows:

**Knowingly**, as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence. . . . We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.

As a management employee, a foreman, Mr. Kuda is held to a high standard of care with regard to the safety of the men who work at his direction. He knew of the violative condition and yet did not ensure its abatement, but rather allowed the equipment to remain in service in an unsafe condition. I conclude, therefore, that his failure to remove the truck from service represented more than ordinary negligence. Accordingly, I find he knowingly violated the standard.

The Secretary has proposed that Mr. Kuda pay a civil penalty of \$500, the same amount as that proposed against the corporate operator. I, however, feel that this was most probably an

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<sup>1</sup> Section 110(c) of the Mine Act provides, in pertinent part, that: **Whenever** a corporate operator violates a mandatory health or safety standard . . . any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation . . . shall be subject to the same civil penalties. . . .@

isolated lapse of judgment on the part of Mr. Kuda for which I find a penalty of \$200 will satisfy the public interest in this matter.

**ORDER**

1. Section 104(d)(1) Citation No. 4329604 **IS AFFIRMED.**

2. The Auxvasse Stone & Gravel Company **IS ORDERED TO PAY** a civil penalty of \$500 within 30 days of the date of this decision.

3 Robert E. Kuda **IS ORDERED TO PAY** a civil penalty of \$200 within 30 days of the date of this decision.

4. Upon receipt of the payments, these cases **ARE DISMISSED.**

Roy J. Maurer  
Administrative Law Judge

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